

No. 15153

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United States  
Court of Appeals  
for the Ninth Circuit

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CALIFORNIA TRUST COMPANY and HUNT  
STROMBERG, Executors of the Estate of  
Katherine Stromberg, Deceased,

Appellants,

vs.

ROBERT A. RIDDELL, Director of Internal  
Revenue and Formerly Collector of Internal  
Revenue for the Sixth District of California,

Appellee.

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Transcript of Record

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Appeal from the United States District Court for the  
Southern District of California,  
Central Division.

FILED

JUL 25 1956



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Southern District of California,  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court for the Southern  
District of California, Central Division

No. 16183-HW

CALIFORNIA TRUST COMPANY and HUNT  
STROMBERG, Executors of the Estate of  
Katherine Stromberg, Deceased,

Plaintiffs,

vs.

ROBERT A. RIDDELL, Director of Internal  
Revenue and Formerly Collector of Internal  
Revenue for the Sixth District of California,

Defendant.

### COMPLAINT

(To Recover Federal Estate Taxes)

Comes now, California Trust Company and Hunt Stromberg, co-executors of the Estate of Katherine Stromberg, deceased, plaintiffs herein, and complain of Robert A. Riddell, Director of Internal Revenue, formerly Collector of Internal Revenue, for the Sixth District of California, the defendant, and allege as follows:

#### I.

Katherine Stromberg died on March 15, 1951, and on May 8, 1951, in proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, designated as No. 316324 in the probate files of said Court Letters Testa-

mentary were duly issued to plaintiffs as Executors. At all times since said date, plaintiffs have been and now are the duly appointed, [2\*] qualified and acting Executors of the estate of said decedent.

## II.

Plaintiff, California Trust Company, is a corporation duly qualified to do business in the State of California, having its principal place of business in Los Angeles, California, and plaintiff, Hunt Stromberg, is a resident of the Southern District of the State of California, residing at 10401 Wilshire Boulevard, West Los Angeles, California.

## III.

Defendant is Director of Internal Revenue for the District which includes Los Angeles County. From May 1, 1950, to November 25, 1952, defendant was Collector of Internal Revenue for the Sixth District of California. From November 25, 1952, to the present date defendant has been and now is Director of Internal Revenue for the Sixth District of California.

## IV.

On or about February 28, 1952, plaintiffs filed with defendant, then Collector of Internal Revenue, an estate tax return for the estate of Katherine Stromberg, deceased. The tax liability disclosed on said return was \$17,017.58 which sum was paid to the defendant on April 28, 1952.

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\*Page numbering appearing at foot of page of original Certified Transcript of Record.

## V.

On or about January 28, 1953, defendant, then Director of Internal Revenue, mailed to plaintiffs a copy of a report of examination of said estate tax return in which a deficiency of \$47,271.57 was proposed. On April 13, 1953, defendant notified plaintiffs that a tax in the amount of \$47,271.57 and interest in the amount of \$2,220.47 or a total of \$49,492.04 had been assessed against plaintiffs. Demand was therein made for immediate payment of said tax and interest. On April 23, 1953, plaintiffs paid to defendant the sum of \$47,271.57 plus interest in the sum of \$2,220.47 or a total of \$49,492.04 in payment of said tax and [3] interest.

## VI.

On June 19, 1953, plaintiffs filed with defendant a claim for refund of taxes and interest, a copy of which is attached hereto, made a part hereof, and marked Exhibit "A." On November 24, 1953, defendant notified plaintiffs in writing that there were no grounds for reduction in tax liability as a result of the examination of the estate tax return and the claim for refund filed. A copy of the examining officer's report, dated October 27, 1953, was attached to said notice.

## VII.

More than six months has elapsed from the date of filing such claim for refund. No notice of the disallowance of the claim for refund or any part thereof has been mailed by registered mail by the Commissioner of Internal Revenue to plaintiffs.

## VIII.

In decedent's will dated March 27, 1947, which will was probated as decedent's last will and testament, decedent bequeathed her entire estate to her husband, Hunt Stromberg. Said will provided in part, "Should he predecease me or fail to survive distribution of my estate, I give, devise and bequeath my entire estate to my son, Hunt Stromberg, Jr." On September 14, 1951, after the first Account Current and Report of Executors had been filed and approved by the said probate court and pursuant to a petition for partial distribution, which petition was prepared and filed by plaintiffs, the Court ordered a distribution of certain assets of the estate to Stromberg. The assets ordered to be distributed by the Court totalled \$113,024.31. On May 16, 1952, the Court ordered a further distribution of the assets of said estate and on August 15, 1952, the remaining assets of the estate were distributed to Hunt Stromberg pursuant to the [4] provisions of decedent's last will and testament. Hunt Stromberg, husband of decedent, survived each of the distributions ordered to be made by the Court, and no part of decedent's estate passed to any person other than Hunt Stromberg. All distributions ordered to be made by the Court were made forthwith. Plaintiffs as executors have complied with all statutory requirements of the probate of the will and settlement of the estate of said decedent and have performed all acts required by the California Probate Code.

IX.

In his examination of the estate tax return, the examining agent made two errors which resulted in the assessment of a tax in excess of the lawful tax liability of the plaintiffs herein:

(a) The examining agent improperly included in the gross estate of decedent the sum of \$71,368.55 which amount is one-half of the cash surrender value of certain insurance policies on the life of the surviving spouse of decedent, and

(b) Disallowed as a deduction one-half of the total bequests to decedent's surviving spouse.

X.

As to the error alleged in paragraph IX (a) above, plaintiff alleges that decedent had no interest, community or otherwise, in the life insurance and annuity policies owned by her surviving spouse and upon his life which is includible in decedent's gross estate for estate tax purposes under any internal revenue law or regulation. As to the error alleged in paragraph IX (b) above, plaintiffs allege that a marital deduction equal to one-half of the value of the adjusted gross estate passing to the surviving spouse is proper under Section 812(e) of the Internal Revenue Code. [5]

XI.

No part of the taxes herein before claimed to have been illegally assessed and collected has ever

been repaid, refunded or remitted to plaintiffs and no part thereof has been allowed to said plaintiffs by way of credit or offset against any other tax due or claimed to be due from them to the United States.

## XII.

Plaintiffs' correct tax liability is \$4,641.12 and not \$64,289.15 as assessed and collected by defendant. Interest in the amount of \$2,220.47 has been erroneously and illegally assessed and collected. The total tax and interest erroneously and illegally assessed and collected is \$61,868.50.

Wherefore, plaintiffs demand judgment against defendant for the sum of \$61,868.50 plus interest thereon as provided by law and for such other and further relief as may be just and proper in the premises.

WRIGHT, WRIGHT, GREEN  
& WRIGHT,

LOYD WRIGHT, and  
CHARLES A. LORING,

By /s/ S. EARL WRIGHT. [6]



EXHIBIT A

Form 843

Treasury Department

Internal Revenue Service

Claim

To Be Filed With the Collector Where  
Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

Refund of Taxes Illegally, Erroneously, or Excessively Collected.

Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

[Collector's Stamp]: Received, 95, June 19, 1953.  
Director Int. Rev., Los Angeles.

State of California,  
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Estate  
of Katherine Stromberg, Deceased.

Business address: c/o California Trust Co., 629 S.  
Spring Street, Los Angeles, California.

Residence .....

The deponent, being duly sworn according to law, deposes and says that this statement is made on be-

half of the taxpayer named, and that the facts given below are true and complete:

1. District in which return was filed: Sixth, California.

\* \* \*

3. Character of assessment or tax: Estate Tax.

4. Amount of assessment, \$66,509.62; dates of payment, April 28, 1952 and April 23, 1953.

\* \* \*

6. Amount to be refunded: \$61,868.50.

\* \* \*

8. The time within which this claim may be legally filed expires, under Section 910 of Internal Revenue Code on April 28, 1955.

The deponent verily believes that this claim should be allowed for the following reasons:

Statement Attached.

CALIFORNIA TRUST CO.,

By /s/ C. L. PATTERSON,

Trust Officer;

HUNT STROMBERG,

Executors of the Estate of Katherine Stromberg,  
Deceased (Duly Appointed and Still Acting).

Subscribed and sworn to before me this 16th day of June, 1953.

[Seal] /s/ MYLA J. EMERSON,

Notary Public in and for the County of Los Angeles, State of California. [9]



## Statement

On or about February 28, 1952, the undersigned, as co-executors of the Estate of Katherine Stromberg, Deceased, filed an Estate Tax Return Form 706 for said estate, which return showed a tax liability of \$17,017.58. The tax disclosed on said return was paid by the estate on April 28, 1952.

Subsequently, the estate received a letter dated January 28, 1953, signed by R. A. Riddell, Director of Internal Revenue, which letter notified the estate of certain adjustments or conclusions resulting from the examination of the Estate Tax Return filed. The adjustments or conclusions were set forth in a report attached thereto resulting in a proposed deficiency in estate tax of \$47,271.57. Thereafter, the undersigned, for and on behalf of the estate, executed Form 890, Waiver of Assessment of Tax, and filed said form with the Director of Internal Revenue at Los Angeles. Thereafter, the estate received a statement of estate tax due, dated April 13, 1953, which statement gave notice that estate tax of \$47,271.57 and interest of \$2,220.47 had been assessed to the estate. On April 23, 1953, the estate paid the amount of tax and interest demanded in said notice.

The estate contends, by and through the undersigned co-executors, that the assessment of the amount of tax as shown on the Estate Tax Return filed and the assessment of tax and interest as shown in the deficiency letter of January 28, 1953, were erroneous and/or illegal and that the taxes

paid pursuant to said accounts were erroneously and illegally collected. [10]

More particularly, the estate contends that (a) \$71,368.55, which is one-half of the cash surrender value of the insurance policies on the life of the surviving spouse of Katherine Stromberg, is not properly includible in the gross estate for estate tax purposes; and (b) \$148,266.41, which is the total bequests, etc., to the surviving spouse, but not in excess of one-half of the adjusted gross estate, is properly a deduction in computing the taxable estate for estate tax purposes.

The grounds on which the estate relies are as follows:

As to (a) above, the community interest if any of the decedent in life insurance and annuity policies of the surviving husband is not includible in the gross estate; see *Waechter et al. v. U.S.A.* 98 Fed. Sup. 960 (1951) affirmed C.C.A.—9, April 28, 1952.

As to (b) above, the estate is entitled to a deduction of one-half of the value of the adjusted gross estate passing to the surviving spouse; this deduction is not properly disallowed as a terminable interest or upon any other basis where the interest of the surviving spouse was actually distributed to him by order of the Probate Court within six months of the date of death of Katherine Stromberg. Complete title to such interest actually vested in the surviving spouse within six months of the death of Katherine Stromberg.

Wherefore, the estate, by and through the undersigned, respectfully requests the refund of the amount claimed together with interest thereon or such greater amount as may be legally refundable.

[Endorsed]: Filed January 13, 1954. [11]

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[Title of District Court and Cause.]

### ANSWER

Comes now the defendant in the above-entitled cause and in answer to plaintiffs' complaint, admits, denies, and alleges:

#### I.

Admits the allegations contained in paragraph I of the complaint.

#### II.

Admits the allegations contained in paragraph II of the complaint.

#### III.

Admits the allegations contained in paragraph III of the complaint.

#### IV.

Admits the allegations contained in paragraph IV of the complaint.

#### V.

Admits the allegations contained in paragraph V of the complaint. [12]

#### VI.

For answer to paragraph VI, defendant admits that on June 19, 1953, plaintiffs filed with the de-

defendant a claim for refund of taxes and interest; that a purported copy of said claim is attached to the complaint and marked Exhibit A; that on November 24, 1953, defendant notified plaintiffs in writing that there were no grounds for reduction in tax liability as a result of the examination of the estate tax return and the claim for refund filed, and admits that a copy of the examining officer's report dated October 27, 1953, was attached to said notice. Except as otherwise admitted in this answer, all allegations contained in said refund claim, Exhibit A, are denied.

#### VII.

Admits the allegations of paragraph VII, and for further answer defendant states that registered notice of rejection of plaintiffs' claim for refund as forwarded to them on January 14, 1954.

#### VIII.

The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in paragraph VIII of the complaint.

#### IX.

Denies the allegations contained in paragraph IX of the complaint.

#### X.

Denies the allegations contained in paragraph X of the complaint.

#### XI.

Admits the allegations contained in paragraph XI of the complaint.

XII.

Denies the allegations contained in paragraph XII of the complaint.

Wherefore, having fully answered, defendant prays for judgment [13] in his favor, for dismissal of plaintiffs' cause of action, for costs, and all other just and proper relief.

LAUGHLIN E. WATERS,  
United States Attorney,

EDWARD R. McHALE,  
Assistant United States At-  
torney, Chief, Tax Division,

/s/ EDWARD R. McHALE,  
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed May 14, 1954. [14]

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[Title of District Court and Cause.]

MEMORANDUM OPINION

Katherine and Hunt Stromberg were wife and husband and, at the time of the death of Katherine Stromberg on March 15, 1951, were residents of the County of Los Angeles, State of California. During their marriage the husband, Hunt Stromberg, purchased certain life insurance and annuity policies. The policies were selected by Hunt Stromberg and purchased by him from earnings received for per-

sonal services. He retained possession of the policies and had the right to change the beneficiary at will. [75]

Upon the death of Katherine Stromberg her will was admitted to probate, and the California Trust Company and Hunt Stromberg were appointed executors. The executors filed a Federal Estate Tax Return, disclosing a tax liability of \$17,017.58. The executors did not list in the assets of the estate any interest of decedent in the aforementioned policies.

In April, 1953, plaintiffs received notice from defendant that additional estate taxes in the amount of \$47,271.50 were due as, according to the Internal Revenue Department, the executors should have listed for estate tax purposes one-half of the cash surrender value of the insurance policies. The amount demanded was paid. A claim was duly filed for refund of the claimed overpayment, and subsequently this suit was filed.

Two problems are presented to the Court:

1. Did decedent, Katherine Stromberg, have an interest in the life insurance and annuity policies referred to above which interest should have been included in decedent's gross estate for estate tax purposes?

2. Was the estate of Katherine Stromberg, in computing the estate tax, entitled to a marital deduction for any portion of the property passing to her surviving spouse?



According to the stipulation of facts on file in this action, Mr. and Mrs. Stromberg at all material times were residents of the State of California, and the policies in question were purchased and paid for from earnings of Mr. Stromberg received by him for personal services. [76]

It seems hardly necessary to cite cases to the effect that in California (a community property state) the earnings of the husband during the marriage are community property—California Civil Code §164; *Thorp vs. Thorp*, 75 C.A. 2d 605; *Sbarbaro vs. Rosa*, 48 C.A. 2d 584—and that property purchased from such earnings is also community. The earnings of Hunt Stromberg for personal services rendered were community funds, and as a consequence this Court must find that the insurance policies purchased with such funds were community property. (*Union Mutual Life Insurance Company vs. Broderick*, 196 C. 497.)

In the State of California a wife has a one-half undivided interest in community property. It is true the husband retains possession and control of community personal property (California Civil Code §172); but the husband cannot devise the wife's interest in community property, either real or personal (California Probate Code §§201, 201.5). She has such an interest in community property that it is possible for her to will away her portion thereof and thus, at her death, cause a division of the community estate. (Probate Code §202.) The fact that the policies in question were retained by the hus-

band and that he had a right to change beneficiaries at will does not mean he could deprive the wife of her community interest therein without her consent. Inasmuch as Katherine Stromberg had a community interest in the policies at the time of her death, it will be the finding of this Court that the Commissioner of Internal Revenue was correct when he determined there should have been included in the gross estate of Katherine Stromberg, deceased, an undivided one-half interest in the cash surrender value of the policies in question. [77]

The second problem presents a more serious question. Although marital deduction was a part of the Revenue Act of 1948, the Court has been able to find only one case in which a Circuit Court has had occasion to pass upon "marital deduction." (*Kasper v. Kellar*, 217 F. 2d 744.)

According to the brief filed by plaintiffs in the case at bar, "the purpose of the marital deduction statute was to equalize the Estate Tax burden between community and separate property states." Prior to 1948 there had been considerable agitation throughout the country relative to discrimination in favor of residents of community property states who were able to divide the community income, filing separate tax returns based upon one-half of the community income to bring themselves within a lower surtax bracket. This privilege was not accorded to residents of non-community-property states and was recognized as unjust, for taxpayers should be treated indiscriminately, wherever resi-



dent; and we agree with the statement in plaintiff's brief to the effect that the marital deduction statute was to equalize in effect the tax burden between community and separate property states.

In community property states which allocate an undivided one-half interest in the community property there is no necessity for a marital deduction. In non-community-property states in which the wife does not have an undivided one-half interest in property there was a necessity for the marital deduction; so it seems to this Court from reading the very statute in question that the marital deduction does not apply to community property. It applies only to separate property. If the rule were otherwise, in California the wife would be entitled to her one-half undivided [78] interest in community property and then, if the executors were also entitled to a marital deduction, that deduction would be placed upon the exemptions of community property, and the injustice which existed prior to 1948 would continue to exist, even now. Certainly it was not the intent of Congress in passing the new law to continue in effect the injustice which they were trying to rectify by the Act of 1948. A reading of the statute in question certainly leads the Court to the conclusion that if Congress was trying to equalize the estate tax burdens between community and non-community property states, it would not allow a marital deduction on community property.

Regulations 105 covering Estate and Gift Taxes, §81.47a, provide in effect that the marital deduction

is generally not available in the event decedent's gross estate consists exclusively of property held by him and his surviving spouse as community property.

Concerning whether or not the insurance policies in question are community property, this Court holds they are.

Concerning whether or not plaintiffs are entitled to a marital deduction, this Court holds that as to the insurance policies plaintiffs are not entitled to such marital deduction.

However, if it should appear that there was separate property in the estate of Katherine Stromberg, then it is possible the estate would be entitled to a marital deduction, but that problem is not now before us.

Judgment is ordered in favor of defendant. Findings of Fact, Conclusions of Law and Judgment are [79] to be prepared by defendant for presentation to the Court for signature on or before December 12, 1955.

Dated this 1st day of December, 1955.

/s/ HARRY C. WESTOVER,  
United States District Judge.

[Endorsed]: Filed December 1, 1955. [80]

United States District Court for the Southern  
District of California, Central Division

No. 16183-HW Civil

CALIFORNIA TRUST COMPANY, et al.,

Plaintiffs,

vs.

ROBERT A. RIDDELL, etc.,

Defendant.

FINDINGS OF FACT, CONCLUSIONS  
OF LAW, AND JUDGMENT

This cause came on for hearing on December 5, 1955, before the Honorable Harry C. Westover, Judge, presiding, without the intervention of the jury. Plaintiffs were represented by their counsel, Wright, Wright, Green and Wright, through Loyd Wright and Charles A. Loring, and the defendant was represented by his counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, and Robert H. Wyshak, Assistant United States Attorney. The Court, having heard and considered all the evidence and stipulations of fact, makes the following Findings of Fact and Conclusions of Law:

Findings of Fact

I.

This is an action for recovery of estate taxes assessed and paid pursuant to the provisions of the

1939 Internal Revenue Code, and jurisdiction is based on Title 28, U.S.C., Section 1340. [90]

## II.

Katherine Stromberg died on March 15, 1951, a resident of the County of Los Angeles, State of California, and on May 8, 1951, in proceedings in the Superior Court of the State of California, in and for the County of Los Angeles, designated as No. 316324 in the Probate files of said Court, Letters Testamentary were duly issued to California Trust Company and Hunt Stromberg, as Co-Executors of the Estate of Katherine Stromberg, and they are now, and at all times material hereto have been, the duly appointed, qualified and acting Executors of said estate.

## III.

California Trust Company is, and at all material times was a California corporation, having its principal place of business in the County of Los Angeles, State of California. Hunt Stromberg is the surviving spouse of decedent, and is and at all material times was a resident of the State of California, maintaining his residence in the County of Los Angeles.

## IV.

From May, 1950, to November 25, 1952, defendant was Collector of Internal Revenue for the Sixth Collection District of California. From November 26, 1952, to the present, the defendant has been, and now is, District Director of Internal Revenue for the Los Angeles District of California.

V.

On April 28, 1952, plaintiffs filed a Federal estate tax return for the estate of Katherine Stromberg, deceased.

VI.

The tax liability disclosed on said return, \$17,-017.58, was paid by plaintiffs to the defendant on April 28, 1952.

VII.

In April, 1953, plaintiff received a notice from defendant that additional estate taxes in the amount of \$47,271.57 and [91] interest in the amount of \$2,-220.47, a total of \$49,492.04, had been assessed against plaintiffs, for which demand was made. On April 23, 1953, plaintiffs paid defendant the said total of \$49,492.04, in payment of the additional estate tax and interest assessed and demanded.

VIII.

On June 19, 1953, plaintiffs filed with defendant a claim for refund of \$61,868.50.

IX.

In January, 1954, plaintiffs received a notice dated January 14, 1954, by registered mail, that plaintiffs' claim for refund had been disallowed.

X.

On March 15, 1951, the date of Katherine Stromberg's death, there were certain life insurance and annuity policies on the life of her surviving spouse, Hunt Stromberg. Katherine Stromberg was named

as beneficiary on each of the policies. Said policies had been purchased by Hunt Stromberg with community property and each and every premium thereafter was paid for with community property. On the date of her death, the decedent had a community interest in the cash surrender value of each of said policies which should have been included in the decedent's gross estate, but which was omitted therefrom in the federal tax return which was filed.

## XI.

The last will and testament of the decedent contained the following provision:

"I give, devise and bequeath my entire estate of whatsoever kind and value and wheresoever situate unto my husband, Hunt Stromberg. Should he predecease me or fail to survive distribution of my estate, I give, devise and bequeath my entire estate to my son, Hunt Stromberg, Jr." [92]

## XII.

On September 14, 1951, one day less than six months after the decedent's death, an order of partial distribution was entered in the Superior Court in and for the County of Los Angeles, probating said will. The decree of distribution distributed the entire estate to Hunt Stromberg and no mention was made therein as to that provision of the will that cited that the property should go to Hunt Stromberg, Jr., the son, in the event that the husband failed to survive distribution.



### XIII.

In the federal estate tax return filed, a maximum "marital deduction" was claimed for the property passing to the surviving spouse, Hunt Stromberg.

### Conclusions of Law

#### I.

The Court has jurisdiction of this action and of the parties thereto.

#### II.

The Commissioner of Internal Revenue properly included in the decedent's gross estate her community interest in the cash surrender value of the life insurance and annuity policies on the life of her husband, Hunt Stromberg, at the time of her death under the provisions of Sec. 811 (a) of the 1939 Internal Revenue Code.

#### III.

The provisions of the decedent's last will and testament determine whether the estate is entitled to a marital deduction within the provisions of Sec. 812 (e), rather than the Decree of Distribution.

#### IV.

The interest of the surviving spouse, Hunt Stromberg, in his wife's estate was a "terminable interest" within the meaning of Sec. 812 (e) (1) (B) of the 1939 Internal Revenue Code and was not [93] within the exception provided for in Sec. 812 (e) (1) (D) of said Code. The surviving spouse's interest created by the will was contingent interest, conditioned on his surviving actual distribution;

and his son, Hunt Stromberg, Jr., also had a contingent interest created by the will, which would take effect and be substituted for the devise to his father, if the latter did not vest.

## V.

Under California law there would have been a lapse where the primary legatee (Hunt Stromberg) did not survive distribution and the gift over (to Hunt Stromberg, Jr.) would have vested at that time.

## VI.

The Commissioner of Internal Revenue properly disallowed a marital deduction in determining the net estate of decedent.

Kasper v. Kellar,  
217 F. 2d 744 (8th Cir. 1954)

## VII.

The defendant is entitled to judgment against the plaintiff, dismissing the complaint herein with prejudice, and for his costs.

## Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed:

That the plaintiffs take nothing by their complaint, that the above-entitled action be dismissed with prejudice, and that the defendant have judgment for, and shall, recover from plaintiffs the amount of defendant's costs, to be taxed by the Clerk of this Court in the sum of \$20.00.



Dated this 29th of December, 1955.

/s/ HARRY C. WESTOVER,  
Judge.

Affidavit of service by mail attached.

[Endorsed]: Lodged December 27, 1955.

[Endorsed]: Filed December 29, 1955.

[Endorsed]: Docketed and Entered December 30,  
1955. [94]

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[Title of District Court and Cause.]

### NOTICE OF APPEAL

Notice is hereby given that the California Trust Company and Hunt Stromberg, executors of the estate of Katherine Stromberg, deceased, plaintiffs in the above-entitled action hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action on the 30th day of December, 1955.

Dated: January 30th, 1956.

LOYD WRIGHT,  
DUDLEY K. WRIGHT,  
WRIGHT, WRIGHT, GREEN  
AND WRIGHT,

By /s/ DUDLEY K. WRIGHT,  
Attorneys for Plaintiffs  
and Appellants.

Affidavit of service by mail attached.

[Endorsed]: Filed January 30, 1956. [96]

In the United States District Court, Southern  
District of California, Central Division

No. 16183-HW Civil

CALIFORNIA TRUST COMPANY, et al.,

Plaintiffs,

vs.

ROBERT A. RIDDELL, etc.,

. Defendant.

Honorable Harry C. Westover, Judge presiding.

REPORTER'S TRANSCRIPT OF  
PROCEEDINGS

Appearances:

For the Plaintiffs;

CHARLES A. LORING, Esq.

For the Defendant;

SIDNEY MACHTINGER.

September 12, 1955—10:00 o'Clock A.M.

The Clerk: No. 11, 16183, California Trust Company, et al., vs. Robert A. Riddell, etc., for setting.

Mr. Loring: Ready for the plaintiffs.

Mr. Machtinger: Ready for the defendant.

Mr. Loring: We have a pretrial statement. The case will be submitted fully on briefs. The plaintiff would like one hour to offer further comments and exhibits.

The Court: If you want to file your briefs——

Mr. Loring: I am prepared to file the plaintiffs' brief now, if the court will specify time for defendant's brief and the closing brief.

The Court: How much time will the defendant need?

Mr. Machtinger: The cases are being handled by Mr. Wyshak, who is out of town this week. If we could have the one hour time necessary after this week——

The Court: I can't give you any time until after October 1st. I am going to have to work you in between the criminal cases. If you will come in October 3 or October 10, I will be glad to set the matter down for hearing.

Mr. Loring: May I suggest it would probably be most expeditious if we can file the briefs before the hearing.

The Court: Yes. I would like to have your briefs filed so I can read the briefs and determine what the points of law are. [2\*]

Mr. Loring: We would suggest 30 days for the defendant and 20 days for the plaintiff to reply.

The Court: Is that satisfactory?

Mr. Machtinger: That is satisfactory.

The Court: Such is the order.

The matter will be submitted on briefs. [3]

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

## Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of January 1956. [4]

/s/ S. J. TRAINOR,  
Official Reporter.

[Endorsed]: Filed May 31, 1956.

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December 5, 1955, 3:00 P. M.

## Appearances:

For the Plaintiffs:

DUDLEY WRIGHT, Esq.,  
CHARLES A. LORING, Esq.,  
CLAYTON HURLEY, Esq.

For the Defendant:

LAUGHLIN E. WATERS,  
United States Attorney, by  
ROBERT H. WYSHAK,  
Assistant United States Attorney.

The Clerk: No. 16,183-HW Civil, California Trust Company vs. Robert A. Riddell, further proceedings.

Mr. Loring: Ready for the plaintiff, your Honor.

Mr. Wyshak: Ready for the defendant, your Honor.

Mr. Wright: Mr. Loring wanted to offer a stipulation.

Mr. Loring: It isn't necessary for me to take it out of the file.

The Clerk: You can't take it out, but I can mark it.

Mr. Loring: I should like to offer in evidence, if the court please, as the plaintiffs' first exhibit in order a pre-trial stipulation filed in this case September 12, 1955.

The Court: It may be received and marked Plaintiffs' Exhibit 1.

The Clerk: Plaintiffs' Exhibit 1.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 1.)

Mr. Loring: I should like next to offer in evidence as Plaintiffs' Exhibit 2 a supplemental pre-trial stipulation signed this date by counsel for both sides.

Mr. Wyshak: Your Honor, with respect to this pre-trial stipulation——

The Court: Are you talking about No. 1 or No. 2?

Mr. Wyshak: The supplemental or, rather, Exhibit 2 for [2\*] identification. I should like to object on the grounds that——

The Court: Have you stipulated to it?

Mr. Wyshak: We reserved our objection, your Honor. I object on the grounds that the tax return speaks for itself and what the Commissioner of Internal Revenue determined is irrelevant and immaterial to the issues in this action.

The Court: Now, you say the Commissioner of Internal Revenue determined all the property was separate property. How about the insurance policies?

Mr. Loring: That is covered, if you will finish reading.

The Court: The objection is overruled. It may be filed. It is received as Exhibit 2.

The Clerk: Exhibit 2.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 2.)

The Court: Now, I understand from this stipulation that all the property was separate property with the exception of the insurance policies.

Mr. Loring: And the residence and the furnishings thereof.

The Court: The residence and furnishings.

Mr. Loring: That's right.

The Court: All the other property was separate property.

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\*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Loring: That's right.

Mr. Wyshak: The Commissioner so determined, your Honor. [3]

The Court: You are not going to dispute the Commissioner's determination, are you?

Mr. Wyshak: Well, I don't intend to dispute it, your Honor, but I am not conceding that we are bound by the determination.

The Court: All right.

Mr. Loring: I should like next to offer in evidence as Plaintiffs' Exhibit 3 a certified copy of the entire proceedings in the probate of the estate of Katherine Stromberg in the Superior Court of California and for the County of Los Angeles, being No. 316324 in the records and files of that court, excluding only the copies of the last will and testament that appear in this certification.

The Court: How about the last will and testament? Do you think that ought to be part of the record?

Mr. Loring: I should like to explain this to your Honor. At the time this document was certified, I ordered the entire probate proceedings, but in researching the law of this case, as my briefs on file here disclose, I find the law of California to be that the succession to the estate, that is to say, the question of whether or not the surviving spouse acquired a terminable interest in the estate is to be determined exclusively by the decree of distribution in the estate and the court is not entitled to look at the last will and testament any more than



it is entitled to look into any other evidence [4] upon which a judgment is based.

The Court: Supposing I would disagree?

Mr. Loring: That is your Honor's privilege.

The Court: Suppose I thought I should look at the last will and testament.

Mr. Loring: If your Honor would permit me to make the offer in this form, I assume that the government counsel will offer the will.

The Court: Have you got a copy, certified copy?

Mr. Loring: It is a part of this document, your Honor.

The Court: Is it a part of that document?

Mr. Loring: It is, your Honor, but I am not offering it as a part of my offer.

The Court: All right.

Mr. Wyshak: Your Honor, I am going to object on the ground that the file, with the exception as noted by counsel, is irrelevant, incompetent and immaterial to the issues in this case.

The Court: Overruled. It may be admitted.

The Clerk: Plaintiffs' Exhibit 3.

(The exhibit referred to was received in evidence and marked as Plaintiffs' Exhibit No. 3.)

The Court: That is with the understanding I will entertain a motion by the government at the proper time to admit in evidence a copy of the last will and testament. [5]

Mr. Loring: Yes, your Honor. I should like to



next offer into evidence a photostatic copy of the estate tax return in this matter filed by the plaintiff.

The Court: It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 4.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 4.)

Mr. Loring: I should like next to offer as Plaintiffs' Exhibit in evidence the photostatic copy of the report of the agent for the Internal Revenue Department dated January 28, 1953.

Mr. Wyshak: I will object to that, your Honor, as irrelevant and immaterial.

The Court: Overruled. It may be admitted in evidence.

The Clerk: Plaintiffs' Exhibit 5.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 5.)

Mr. Loring: I should like next to offer in evidence a photostatic copy of the notice of deficiency estate tax sent by the Department to the plaintiff.

Mr. Wyshak: Your Honor, I will object to that as immaterial on the ground we have already stipulated a tax was paid and the amount.

The Court: I know, but what difference does it make?

Mr. Wyshak: That is exactly my point. It doesn't make any difference. [6]

The Court: Overruled. It may be admitted in evidence.

The Clerk: Plaintiffs' Exhibit 6.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 6.)

Mr. Loring: I should like next to offer in evidence, if the court please, a photostatic copy of the claim for refund prepared by the plaintiff and submitted to the defendant.

Mr. Wyshak: Your Honor, I will withhold an objection if counsel will specify that his offer is merely to show that the claim was timely and that the grounds for the claim are the same as the grounds for this suit, that any statements therein are not to be accepted for the truth of the matter asserted.

The Court: He has only offered it as a claim filed.

Mr. Wyshak: As far as I know, he hasn't specified what his offer is for.

The Court: Showing that the claim was filed. I am not receiving it as evidence of the truth of the claim. I am receiving it only as evidence they made a claim to the government.

Mr. Wyshak: Then I have no objection, your Honor.

The Court: It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 7.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 7.)

Mr. Loring: I should like to next offer in evidence, if [7] the court please, a photostatic copy of the determination by the Internal Revenue Department dated November 24, 1953, denying the claim for refund.

The Court: It may be received in evidence.

Mr. Wyshak: May I see that?

Mr. Loring: I might say, if the court please, that I have furnished counsel with photostatic copies of all of these documents.

Mr. Wyshak: Your Honor, I will object to this for the reason that the official disallowance of the claim for refund is the only thing which causes jurisdiction to vest in this court and the revenue agent's determination with respect to the claim for refund is irrelevant and immaterial.

The Court: Overruled. It may be received in evidence.

The Clerk: Plaintiffs' Exhibit 8.

(The document referred to was received in evidence and marked as Plaintiffs' Exhibit No. 8.)

Mr. Loring: May I have just a moment, your Honor? If the court please, I should like to call very briefly as a witness for the plaintiff Mr. Hunt Stromberg.

The Court: Come forward. [8]

## HUNT STROMBERG

called as a witness by and on behalf of the plaintiffs herein, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you take the stand, please, and state your name?

The Witness: Hunt Stromberg.

## Direct Examination

By Mr. Loring:

Q. Mr. Stromberg, you are one of the plaintiffs in this action? A. Yes.

Q. Were you married to the decedent, Katherine Stromberg? A. Yes.

Q. When did you marry the decedent?

A. Well, it was——

Q. Approximately.

A. Approximately 41 years ago, whatever that date would be.

Q. How long did you live in the State of California?

A. Lived in the State of California since, oh, approximately 1919.

Q. Since 1919? [9] A. Yes.

Q. Continuously? A. Yes.

Q. You and the decedent? A. Yes.

Q. At the time you came to California in 1919, did you and your wife have any property?

A. No.

Q. Was all of the property which you and your wife acquired since your marriage acquired as a

(Testimony of Hunt Stromberg.)

result of your personal services within the State of California?           A. Yes.

Q. During your marriage to the decedent Katherine Stromberg, did you give her certain properties—strike that.

Did you give the decedent any money?

A. Yes.

Q. Do you know approximately when you gave her money for the first time, any substantial amount?

A. I don't think offhand, without looking at the records, that I could give you that date.

Q. Can you give it to us approximately?

A. Oh, I would say, my wife passed away in 1951, and I would imagine it was maybe 10 or 12 years prior to that. As I say, I wouldn't be too accurate on that, on the dates. I did on several occasions, however, give her money. [10]

Q. Did you file and pay a gift tax return in connection with those moneys that you paid your wife?

A. It is my understanding that we did, yes.

Q. Do you know what your wife did with those moneys?

A. Yes. I know that my wife bought certain stock and also two annuity policies. I can't recall now the exact company, but insurance policies, annuities, and she might have bought jewelry, also.

Q. I direct your attention to a schedule of stocks and bonds that appear annexed to Schedule B of the estate tax return that has been received in evidence in this matter, and ask you if that is a sched-

(Testimony of Hunt Stromberg.)

ule of stock and bonds which your wife purchased with the money which you gave her during your marriage?      A. I believe it is.

Q. I direct your attention to another page of that exhibit, I believe it is Schedule C or F—Schedule F, items 10 and 11, which describe policies issued by the Manufacturers Life Insurance Company of Toronto, Canada, for the principal amount of \$50,000, and ask you if you know those are policies which your wife purchased with the money which you gave her.

A. Yes. I am clear on that, very definitely.

The Court: May I inquire, was this stock issued in the name of any person or persons?

Q. (By Mr. Loring): Do you know whether this stock was [11] issued in your name or in your wife's name or both of you, or somebody else?

A. As I recall it, we had three accounts. One account was tenants in common, and another account was in my wife's name, and then we had an account at the California Trust Company in my name. I believe the stock that she purchased directly with money I had given her, they were made out directly in her name when they were received, but again, as I say, that has been a long time ago, and to be accurate, I believe the California Trust Company could answer that better than I could, because they had charge of my affairs.

Mr. Loring: I have no further questions.

The Court: I understand, then, that when you



(Testimony of Hunt Stromberg.)

and your wife came to California you didn't have any property?

The Witness: No, your Honor.

The Court: Except nominal. You made it all here.

The Witness: Yes.

The Court: And during the years you gave some of the money you were making, a certain amount of money to your wife?

The Witness: That's right.

The Court: And she bought stock with it?

The Witness: That's right.

The Court: All right.

The Witness: And the insurance policies. [12]

Mr. Loring: May the record show that the estate tax return concerning which I was examining the witness is Plaintiffs' Exhibit 4 in this case?

The Court: Any questions? May I inquire, the income tax returns that were prepared, were they joint returns or separate returns?

Mr. Loring: I will ask the witness that question.

Q. Do you know, Mr. Stromberg?

A. I believe they were joint returns.

The Court: And this income from this stocks and bonds was put in the joint account?

The Witness: I couldn't answer that accurately. I believe that the income from the stocks that were in my wife's name went directly to her. That is my recollection.

The Court: It is not a question of where they



(Testimony of Hunt Stromberg.)

went. I want to know how she reported it on her income tax return.

The Witness: Well, that would be of record. We certainly have records of all the income tax returns but, as I say, I just don't know—my memory on that, on those details, is not too good, but we have very clear records and I could certainly show you.

### Cross-Examination

By Mr. Wyshak:

Q. Directing your attention to Schedule E of Exhibit 4, [13] the estate tax return, headed Jointly Owned Property, an account in the Farmers & Merchants Bank, do you know the source of those funds? A. What year was that?

Q. That was the year of her death or at the time of her death.

A. At the time of her death? Well, is that a joint account?

Q. It is listed under Jointly Owned Property.

A. I wouldn't know. I could get you that information. The man who handles those things for me could tell you. I would imagine—did you say that was under her name?

Q. I don't know in whose name it is. It is listed as a jointly owned account.

A. She might have put the money in there from money I had given her. I really don't know, but I could acquire that information for you.

Q. Directing your attention to Schedule C of

(Testimony of Hunt Stromberg.)

the said exhibit headed Mortgages, Notes and Cash, there are five items of cash or bank deposits. Was that money you had given her or the result of dividends which she had received on stocks in her name?

A. I would imagine it was the receipts of dividends she had received, that money that was in her safety deposit box, because she put it in there. I know that. I did not know it [14] was in there until we opened the box.

Q. How about the money in her commercial account in the California Bank in Beverly Hills?

A. It was only \$145. It was household money, perhaps. It looks like it is household money.

Mr. Loring: We can't hear the witness, your Honor.

The Witness: Pardon me?

Mr. Loring: We can't hear you.

The Witness: I say it is \$147 in the California Bank. It looks to me like that is household money that she might have used for a household checking account. I know she did banking there.

Q. (By Mr. Wyshak): How about the checked items on that schedule?

A. It appears to me those were dividends that came to her from the stocks she had. It looks that way to me.

Q. This is the estate tax return?

A. It looks to me like that is what it is.

Q. You would say there was the same source

(Testimony of Hunt Stromberg.)

for the money on deposit with the California Bank Nos. 3 and 4?

A. I would imagine that is—well, pardon me. It is probably money she put in there.

Q. And also——

A. But whether it came from dividends or whether I gave it to her, right now I wouldn't be able to remember. [15]

Q. Would that be your answer with respect to the \$811.57 item?

A. Yes, it would, because I imagine that might have come in from the dividends on the stocks she had.

Mr. Wyshak: Your Honor, I offer to stipulate that Schedule F of Exhibit 4, the estate tax return, typed Schedule F, headed Other Miscellaneous Property, that items 2 through 9, starting with the 1937 Packard and, 9, the yellow metal stickpin, that the items there listed are separate property.

Mr. Loring: And were separate property of the deceased at the time of her death. So stipulated.

Mr. Wyshak: No other questions, your Honor.

The Court: You may step down.

(Witness excused.)

Mr. Loring: We have no further evidence to offer, if the court please. The plaintiff rests.

Mr. Wyshak: The government has no evidence, your Honor.

The Court: How about the last will and testament? I want that in the record. I accepted the

plaintiffs' offer with the understanding the government was going to introduce in the record the last will and testament. They excluded that from their offer. They have only introduced the decree of distribution.

Mr. Wyshak: Insofar as we are concerned, your Honor, it [16] is up to the plaintiff to come into court and prove their case and prove they are entitled to the refund.

The Court: I know, but the plaintiff says it doesn't make any difference what the will says, that it is the decree of distribution that counts. If you are willing to stipulate that, that will simplify the case.

Mr. Wyshak: I am not willing to stipulate that.

The Court: Then you better introduce your copy of the last will and testament.

Mr. Wyshak: I think the burden of proof is on the plaintiff, your Honor. I feel that their proof would be deficient in that regard.

The Court: I think I am entitled to have the will before me. Do you have any objection to having the will introduced?

Mr. Wyshak: I have no objection.

The Court: Then make your offer. I want it before me. I want to consider it.

Mr. Wyshak: I don't want it as part of my case, your Honor. It is up to the plaintiff to do it. I feel their proof is deficient if they don't offer the will.

The Court: Now, Mr. Wyshak, they say it doesn't make any difference what the will and testa-

ment says, the thing that controls in California is the decree of distribution. I have only the decree of distribution. If you don't offer the will, I will rule against the government on that proposition [17] right now, if you don't want to offer the will.

Mr. Wyshak: All right, your Honor, I will offer the will appended to Exhibit 3 as our Exhibit A.

Mr. Loring: To which offer we object on the ground it is incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues of this case, and an attempt to impeach a final judgment of the State court by which this court is bound.

The Court: Overruled. It may be received.

The Clerk: Is this the last will and testament of Katherine Stromberg?

Mr. Wyshak: Yes.

The Clerk: Government's Exhibit A.

(The document referred to was received in evidence and marked as Government's Exhibit A.)

The Court: That is one of the issues to be determined in this lawsuit here. If I sustained an objection, then I would have determined right now that it is the decree of distribution and not the will.

Mr. Loring: May I be heard briefly in oral argument, your Honor?

The Court: Yes. I don't want to foreclose you. I almost foreclosed you the other day. I don't want to commit the same error twice.

Mr. Loring: In your Honor's opinion in this matter, you [18] stated at the end, if I may call the court's attention to it——

The Court: I have it.

Mr. Loring: Page 5, line 25. "However, if it should appear that there was separate property in the estate of Katherine Stromberg, then it is possible the entire estate would be entitled to marital deduction, but that problem is not now before us."

May I call the court's attention to Schedule M of the estate tax return, Plaintiff's Exhibit 4 in evidence. The taxpayer returned the entire estate on the basis that it was community property. Inasmuch as the entire estate is community property, the taxpayer took a deduction of \$148,226.41. Now, may I call the court's attention to the agent's report.

The Court: Now, just a minute, before we get to the agent's report. You come in and you file a schedule with the government. I say you, but I don't know who filed it. The plaintiff filed a schedule with the government.

Mr. Loring: Yes, your Honor.

The Court: They say all this property is community property, and now you come into court and say only a very small part is community property.

Mr. Loring: The reason for that I will call the court's attention to in a moment, if I may.

The Court: All right.

Mr. Loring: The agent's report, dated January 28, 1953—— [19]



The Court: May I have the report? What is the exhibit number?

Mr. Loring: I believe it is Exhibit 5, January 28, 1953.

The Court: All right.

Mr. Loring: I believe it is page 5, under Schedule 1(b), it explains the changes in deductions. They have set up in the left-hand column a schedule of what the agent determines was the separate property of the deceased with reference to the schedules of the estate tax return. Schedule A, under separate property, \$42,500 under community property. That was the residence of the parties.

Schedule B, the item of \$150,726.72 is the schedule of stocks and bonds.

Schedule C, \$4,354.42, are these little items of cash, mortgages, notes and cash.

Schedule F is an item of \$104,419.94, the miscellaneous and other miscellaneous property, and as to that they determine that half of the furniture, furnishings, clothing, and so forth, being in the sum of \$4,593, was community property, and the balance of the miscellaneous items were separate property.

Now, we find ourselves in this situation. The taxpayer has filed an estate tax return on the basis of community property. The Commissioner has determined, after investigation, that the bulk of the property was separate property. We are not [20] going to quarrel with the determination of the Commissioner that it was separate property, for this reason. We take the position, and I think correctly so, that this taxpayer is entitled to the deduc-



tion if it is community property, and we are entitled to the deduction if it is separate property, unless it is separate property and the estate which the surviving spouse acquired was a terminable interest, and as to that we then come down to a question of law. As to that, we have briefed it. We have told your Honor we believe that the husband did not acquire a mere terminable estate, that he acquired a complete estate under the wording of the will, if the will is proper, and under the decree of distribution, in any event.

In other words, your Honor, we believe that the probate file now in evidence in this case proves that this surviving spouse did not have a terminable estate in his wife's estate. Therefore, it being separate property by the determination of the Commissioner, this surviving spouse is entitled to marital deduction, and the Commissioner committed error in disallowing such marital deduction.

The Court: What did you tell me F was on this exhibit?

Mr. Loring: Miscellaneous property, your Honor.

The Court: F is miscellaneous property?

Mr. Loring: Yes, your Honor.

The Court: Mr. Wyshak, are you going to contest this, are [21] you going to argue that the property as set up in this schedule as the wife's separate property is not in truth separate property?

Mr. Wyshak: No, I am not, your Honor.

The Court: You are willing to accede to the determination of the Commissioner?

Mr. Wyshak: I am, your Honor.

The Court: So we can assume, then, that is separate property and we don't have to worry about whether it is community or separate property?

Mr. Wyshak: Yes.

The Court: All right.

Mr. Wyshak: I am going to direct my argument and reply to Mr. Loring's closing argument, your Honor. I think the plaintiff has misconstrued two different subsections of this matter. This says that the estate of the husband will allow for marital deduction if it is sure to vest within six months. In other words, if there was a common disaster clause saying that he has to survive her by five months or by six months.

The Court: If the decree of distribution is controlling, then he would get a whole interest within the six months period.

Mr. Wyshak: There is no question about it, but I was assuming that the decree of distribution doesn't control. I will argue that, if you like. [22]

The Court: I don't care whether you argue it or not.

Mr. Wyshak: I was coming to that eventually. I will argue it first if you prefer.

We are not concerned with how Hunt Stromberg got title to the property. The question here is what did the decedent do in her lifetime to create an interest. The government was not a party to the probate proceedings. There could be all sorts of conclusions.

The Court: Well, I have read your brief. Is that all in there?

Mr. Wyshak: Well, I am not sure.

Mr. Loring: That is all in there.

The Court: Yes, I think it is. Do you want to reply any further?

Mr. Loring: Just one word, your Honor. Our position in the matter is that subsection (d) of Section 8(12) doesn't come into play in this case at all, because under Section B this was not a terminable interest because even under the will no estate passed to any person other than the surviving spouse, and in any event the probate record which is now in evidence in this case shows that all of the separate property in the estate was in fact distributed to and vested in the husband within six months of death.

Mr. Wyshak: Just in passing, your Honor, I would like to point out that appended to the estate tax return, which is [23] in evidence as Exhibit 4, is a copy of the will and not the decree of distribution. That is appended to the estate tax return.

The Court: All right. I will take the matter under submission.

Mr. Wyshak: Thank you.

The Court: Now I can decide this case, can't I, without any further proceeding?

Mr. Loring: I hope so, your Honor.

The Court: Court will now stand in recess until 10:00 o'clock tomorrow morning. [24]

## Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 5th day of March, 1956.

/s/ S. J. TRAINOR,  
Official Reporter.

[Endorsed]: Filed March 6, 1956.

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[Title of District Court and Cause.]

## CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages, numbered 1 to 99, inclusive, contain the original

Complaint;

Answer;

Pre-trial Stipulation;

Trial Brief;

Defendant's Trial Brief;

Plaintiff's Closing Trial Brief;  
Defendant's Reply Brief;  
Decision;  
Supplemental Pre-trial Stipulation;  
Supplemental Memorandum re Marital Deduction;  
Findings of Fact, Conclusions of Law and Judgment;  
Notice of Appeal;  
Designation of Contents of Record on Appeal;

and a full, true and correct copy of the minutes of the Court on September 12, 1955; which, together with Plaintiff's Exhibits 1 through 5, inclusive, and reporter's transcript, all in the above-entitled cause, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above case.

I further certify that my fees for preparing the foregoing record amount to \$2.00, which sum has been paid by appellant.

Witness my hand and the seal of the said District Court this 1st day of March, 1956.

[Seal]                      JOHN A. CHILDRESS,  
Clerk;

By /s/ CHARLES E. JONES,  
Deputy.

[Endorsed]: No. 15,153. United States Court of Appeals for the Ninth Circuit. California Trust Company and Hunt Stromberg, Executors of the Estate of Katherine Stromberg, Deceased, Appellants, vs. Robert A. Riddell, Director of Internal Revenue and Formerly Collector of Internal Revenue for the Sixth District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 4, 1956.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
for the Ninth Circuit

No. 15,153

CALIFORNIA TRUST COMPANY and HUNT  
STROMBERG, Executors of the Estate of  
Katherine Stromberg, Deceased,

Petitioners,

vs.

ROBERT A. RIDDELL, Director of Internal  
Revenue and Formerly Collector of Internal  
Revenue for the Sixth District of California,

Respondent.

STATEMENT OF POINTS AND DESIGNA-  
TION OF RECORD FOR PRINTING

Pursuant to this Court's Rule 17.6, your Petitioner herewith states the points on which he intends to rely and designates those portions of the record which he deems material to this appeal.

Your Petitioner claims that the United States District Court for the Southern District of California, Central Division, erred:

1. In holding that the Commissioner of Internal Revenue properly included in the decedent's gross estate one-half of the cash surrender value of the life insurance and annuity policies on the life of her surviving spouse under the provisions of Section 811(a) of the Internal Revenue Code of 1939.



2. In failing to hold that no part of the life insurance and annuity policies on the life of a husband are includable in the gross estate of a spouse who predeceases him.

3. In holding that the Commissioner of Internal Property disallowed a marital deduction in determining the net estate of the decedent spouse.

4. In failing to hold that the decedent's estate was entitled to a marital deduction in determining the decedent's net estate.

5. In holding that the decedent's estate was not entitled to a refund of \$61,868.50 for overpayment of estate taxes.

6. In failing to hold that the decedent's estate was entitled to a refund of \$61,868.50 for overpayment of estate taxes.

Your Petitioners hereby designate the following portions of the record for printing as material to the appeal:

1. Docket Entries.
2. Complaint.
3. Answer.
4. Transcript of Proceedings.
5. Exhibits 1-8, and A.
6. Memorandum Opinion Filed December 1, 1955.
7. Findings of Fact, Conclusions of Law and Judgment.
8. Notice of Appeal.
9. Statement of Points and Designation of Record.
10. Certificate and Seal.

With respect to designation 5 above, you are advised that Petitioners intend to apply to the above-entitled Court for an order directing that all of the exhibits transmitted by the Clerk of the District Court be considered in their original form without printing.

LOYD WRIGHT,  
DUDLEY K. WRIGHT,  
WRIGHT, WRIGHT, GREEN  
AND WRIGHT,

By /s/ DUDLEY K. WRIGHT,  
Attorneys for Plaintiffs and  
Appellants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed March 10, 1956.

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[Title of Court of Appeals and Cause.]

STIPULATION AND APPLICATION FOR  
CONSIDERATION OF ORIGINAL EX-  
HIBITS

It Is Hereby Stipulated by and between petitioners and respondents, through their respective attorneys of record, that subject to the approval of this Honorable Court the original Exhibit 3 in the above-entitled cause except for that part which comprises the Decree of Distribution of the Estate of Katherine Stromberg, which exhibit has been transmitted to this Court by the Clerk of the United

States District Court for the Southern District of California, Central Division, may be considered by this Honorable Court in its original form without printing.

Petitioners and respondents, through their respective attorneys of record, respectfully make application to this Honorable Court for an order that the original Exhibit 3 with the exception noted above, be considered by this Honorable Court on this appeal in its original form without printing.

April 16, 1956.

LOYD WRIGHT,  
DUDLEY K. WRIGHT,  
WRIGHT, WRIGHT, GREEN  
AND WRIGHT,

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/s/ ROBERT H. WYSHAK,  
Attorneys for Respondents.

[Endorsed]: Filed April 17, 1956.